1980

Kenneth K. Bradford and Tammy Bradford v. Michael Alvey and Vaughn Alvey, D/B/A C. Howard Alvey & Sons, A Partnership; and Michael E. Crowley, A General Partner, D/B/A Micro Investment : Brief of Appellant

Utah Supreme Court

Ronald L. Poulton; Attorney for Respondents;Randall S. Feil; Attorney for Respondents Michael Alvey and Vaughn Alvey; Grant A. Hurst; Attorneys for Appellants

IN THE SUPREME COURT
OF THE STATE OF UTAH

KENNETH K. BRADFORD and TAMMY BRADFORD, his wife, Plaintiffs-Appellants, vs. MICHAEL ALVEY and VAUGHN ALVEY, d/b/a C. HOWARD ALVEY & SONS, a Partnership; and MICHAEL E. CROWLEY, a General Partner, d/b/a MICRO INVESTMENT, a Utah Limited Partnership, Defendants-Respondents.	:	Case No. 16829

APPELLANTS' BRIEF

Appeal from the Judgment in the Third Judicial
District Court of Salt Lake County, State of Utah

Honorable Dean E. Conder, Judge

Grant A. Hurst
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101

Attorneys for Appellants

Ronald L. Poulton
9 Exchange Place, Suite 420
Salt Lake City, Utah 84111

Attorney for Respondent Michael E. Crowley

Randall S. Feil
2000 Beneficial Life Tower
Salt Lake City, Utah 84111

Attorney for Respondents Michael Alvey and
Vaughn Alvey

IN THE SUPREME COURT
OF THE STATE OF UTAH

KENNETH K. BRADFORD and TAMMY BRADFORD, his wife,	:	
Plaintiffs-Appellants,	:	
vs.	:	
MICHAEL ALVEY and VAUGHN ALVEY, d/b/a C. HOWARD ALVEY & SONS, a Partnership; and MICHAEL E. CROWLEY, a General Partner, d/b/a MICRO INVESTMENT, a Utah Limited Partnership,	:	Case No. 16829
Defendants-Respondents.	:	

APPELLANTS' BRIEF

Appeal from the Judgment in the Third Judicial
District Court of Salt Lake County, State of Utah

Honorable Dean E. Conder, Judge

Grant A. Hurst
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101

Attorneys for Appellants

Ronald L. Poulton
9 Exchange Place, Suite 420
Salt Lake City, Utah 84111

Attorney for Respondent Michael E. Crowley

Randall S. Feil
2000 Beneficial Life Tower
Salt Lake City, Utah 84111

Attorney for Respondents Michael Alvey and
Vaughn Alvey

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

Cases - Continued

RULES CITED

IN THE SUPREME COURT
OF THE STATE OF UTAH

KENNETH K. BRADFORD and TAMMY BRADFORD, his wife, Plaintiffs-Appellants, vs. MICHAEL ALVEY and VAUGHN ALVEY, d/b/a C. HOWARD ALVEY & SONS, a Partnership; and MICHAEL E. CROWLEY, a General Partner, d/b/a MICRO INVESTMENT, a Utah Limited Partnership, Defendants-Respondents.	:	Case No. 16829

PLAINTIFFS-APPELLANTS' BRIEF

STATEMENT OF THE CASE

Plaintiffs-Appellants, Mr. and Mrs. Kenneth Bradford, seek specific performance, or in the alternative, damages for breach of an agreement in the form of an Earnest Money Receipt And Offer To Purchase (Exhibit 1).

DISPOSITION IN THE LOWER COURT

The court below held that a condition precedent to the subject agreement becoming binding never occurred. The court

found that Mr. and Mrs. Bradford "failed to reasonably pursue the financing," and thus found for the Defendants-Respondents, "no cause of action." (R. 172, 225-232)

RELIEF SOUGHT ON APPEAL

Mr. and Mrs. Bradford, Appellants, seek to have the judgment for Defendants-Respondents reversed and remanded for a determination of costs and attorney's fees.

STATEMENT OF FACTS

Mr. and Mrs. Bradford have been married for nearly four years. They have three children. Mr. Bradford has been a letter carrier for the U. S. Postal Service for about the last four and one-half years. (R. 369)

In February of 1978, they were in the market for a new home for their expanding family. They drove through the Shiloh subdivision in West Jordan, Utah. Interested in purchasing in that area, they took down a name and telephone number from a sign that was posted in the subdivision. (R. 372)

The sign indicated that Midvalley Investment was marketing the subdivision. Mr. Bradford called the number and talked with Michael Herzog, real estate agent for Midvalley. Mr. Herzog visited Mr. and Mrs. Bradford in their home, at which time he prepared and they signed the Earnest Money Receipt, Exhibit "1," to purchase Lot 95 Shiloh Subdivision, West Jordan, Utah. (R.372)

This was on or about February 17, 1978. The Earnest Money was accepted by Respondents Michael and Vaughn Alvey for Midvalley on or about February 22, 1978. The agreement was expressly made "sale subject to buyer obtaining financing (FHA)." (Exhibit 1). Said Respondents, Alveys, never had any direct contact with either Mr. and Mrs. Bradford. (R. 404, 415, 493, 495)

During all times pertinent hereto, Midvalley Investment's offices were located in the same building as the offices of Respondencts-Alveys. (R. 382, 383) Also, Respondents Michael Alvey and Vaughn Alvey were the vice president/treasurer and president/secretary, respectively, of Midvalley. (R. 374, 450)

A few days after the Earnest Money Receipt, Exhibit "1" was signed, Mr. and Mrs. Bradford were taken by Mr. Herzog to American Home Mortgage. The reason for the meeting was to obtain a "pre-qualification" for a loan commitment. (R. 375) Mr. Herzog told Mr. and Mrs. Bradford to pursue the loan to the extent of keeping American Home Mortgage aware of their continued interest. (R. 278, 279, 413, 414)

[As proferred by the subsequent affidavits of Michael Herzog and Mr. Bradford, and as set forth in the deposition of Mr. Bradford, Mr. Bradford was told he could not get a loan commitment until the home was nearly completed. (R. 194-199, 281, 282) (Note: This testimony was disallowed

at trial on the ground of hearsay. That this was prejudicial error will be set forth below.)]

Barney Alvey is the brother of the Respondents Alveys. He was the general foreman for these Respondents in the construction of the subject home. (R. 376, 450, 451)

About a week after Mr. and Mrs. Bradford had their "pre-qualification" at American Home Mortgage, they met with Barney Alvey and Michael Herzog in Midvalley Investment's office. The house plans were reviewed, and the Bradfords were given Barney Alvey's home telephone number. Mr. and Mrs. Bradford were told to call Barney Alvey with respect to any problems they might have with respect to the home. (R. 376-378, 437) At this time, Barney Alvey told the Bradfords that the home would be completed sometime in July or August of 1978. Bradfords were also given a list of suppliers from whom they could pick out materials for the home. (R. 383)

Pam Tazzer was also employed by Respondents Alveys and worked in the offices of C. Howard Alvey & Sons. (R. 383, 451) In late February, 1978, Mrs. Bradford discussed with Ms. Tazzer over the telephone their choice of brick for the subject house. (R. 438) In early March, 1978, Mr. and Mrs Bradford met with Ms. Tazzer in the offices of Respondents Alveys to choose their tile, tile colors and appliance colors. (R. 383, 384, 438)

In May, 1978, Mr. and Mrs. Bradford met with Barney Alvey at the home site. Discussions were had at that time regarding the problems Respondents Alveys were having in getting the brick for the home (R. 384)

In the latter part of July, 1978, Mr. Bradford telephoned Barney Alvey at his home. Construction of the house was discussed including the fact that there was still a problem in obtaining brick. (R. 384)

In September, 1978, Mr. Bradford again telephoned Barney Alvey at his home and asked why the home was not being worked on and why there was no brick. Barney Alvey stated that there were continuing problems with Interstate Brick Company in obtaining the brick for the home. (R. 385, 386)

Mrs. Bradford also made repeated telephone calls to Ms. Tazzer in March, April, May, and July of 1978. These were primarily for the purpose of choosing the brick, shingles, appliances, and other such items for the house.

In July, Ms. Tazzer indicated to Mrs. Bradford that there was still a problem getting brick, and that it would not be available until September, 1978. (R. 439, 440) In September, 1978, Mrs. Bradford again discussed with Barney Alvey the delay caused by the problem in getting the brick from Interstate. (R. 440) In November, 1978, Mrs. Bradford met with Ms. Tazzer in the offices of Respondents Alveys and picked out the stone work for the house. (R. 440)

In October, 1978, Mr. and Mrs. Bradford sold a duplex they owned and had been living in since prior to the execution of the subject Earnest Money Receipt And Offer To Purchase, Exhibit "1."

In anticipation of obtaining the money needed to get into their new house, Mr. and Mrs. Bradford had advertised the duplex for sale. They received an offer which they considered to be very good and, therefore, accepted. At this time, they realized it would still be a substantial time before the Shiloh house was finished. Not wanting to lose money paying rent, they chose to purchase another home located at 902 Potomac, Salt Lake City, Utah. This was also in October, 1978. (R, 386, 387)

In the first part of December, 1978, the Bradfords were contacted by Respondents Alveys' office and told where to pick out their cabinets. Pursuant to this telephone call, the Bradfords chose their cabinets and paid $52.00 above the standard allowance. (R. 392, Exhibit 8) About one week later, December 12, 1978, the Bradfords paid $157.00 for extra counter-top material used in the Shiloh home. (R. 392, 417, Exhibit 9)

In January, 1979, Mrs. Bradford called Barney Alvey and asked him when the house would be ready as they would need to sell their existing home. (R. 441) Barney Alvey told her that the house would be ready in two months, and they should get their existing house sold. (R. 441)

Sometime in the first week of February, 1979, Mr. Bradford called Barney Alvey and asked why the house was not being worked on. Barney Alvey told him they (Alveys) were finishing another house, but the Bradfords' house was next on line to be finished. (R. 386)

About a month later, early March, 1979, Mr. Bradford again called Barney Alvey and told him they (Bradfords) had sold their Murray home and would have to move within 30 days. Barney Alvey told him the Shiloh house could probably be finished within 30 days (R. 386)

Shortly after this, Mr. and Mrs. Bradford made a formal application to Mason-McDuffie for an FHA loan. This was on or about March 12, 1979. (R. 345, 388) No loan commitment was given on this loan application because the lending institution did not believe the home was substantially enough completed to order and process the needed FHA appraisal. (R. 345)

About the first of April, 1979, and prior to the completion of the loan application described above, Mrs. Bradford called Respondents Alveys' offices and asked for Ms. Tazzer. Respondent Michael Alvey, however, got on the telephone and told Mrs. Bradford that they had sold the Bradford's contract to Respondent Crowley. Mr. Alvey gave Mrs. Bradford Crowley's telephone number. Nothing was said indicating Respondents were going to dishonor the contract, Exhibit 1. (R. 442)

After Mrs. Bradford's conversation with Respondent Michael Alvey, Mr. Bradford telephoned Respondent Crowley. Mr. Bradford asked about the Shiloh property. Although Mr. Bradford expressed a continued interest in purchasing the house, Mr. Crowley stated he could not sell it to them for the original contract price of $54,900.00, but would sell it to them for $62,000.00. (R. 394, 418, 407, Exhibit 1) Crowley told Mr. Bradford that he thought they (Bradfords) had had ample time to secure a loan commitment, but that they had not done so. As a result, Mr. Crowley stated that "inflation had taken the house way past and beyond the point of that contract." He further stated that, "I just economically could not afford to do it as a gratis program and with nothing that I was legally bound to." (Emphasis added.) (R. 507)

Respondents Alveys had conveyed the entire subdivision in which the subject lot and home is located to Respondent Crowley on or about April 2, 1979. (Exhibit 11, 12) The Ernest Money Receipt, Exhibit 11, includes subject Lot 95 and provides on lines 21-24, "Buyer (Crowley) to assume Sellers (Alveys') position in all of the following . . . (2) Sellers obligation for completion of improvements approximately $104,000.00. (3) assume Sellers equity and mortgage obligation on the following homes presently under construction . . . 95* . . . (*indicated the home is pre-sold)." (Emphasis added.) (Exhibit 11)

On April 30, 1979, Mr. and Mrs. Bradford filed the Complaint initiating this action. (R. 2) Subsequently, in July, 1979, Mason-McDuffie gave Mr. and Mrs. Bradford a firm commitment for a $40,000.00 loan. (R. 345, 346, 389) Tender of the full purchase price as per the original agreement, Exhibit 1, was made on July 30, 1979. (R. 390, Exhibit 10)

In May of 1979, Mr. Bradford received $17,000.00 from his parents. This was not listed as an obligation on the subsequent loan application to Mason-McDuffie as there was no firm obligation to repay these monies. (R. 388) The monies would be paid back "if and when" Mr. and Mrs. Bradford were able. (R. 444)

The matter was tried to the Court on the 24th and 25th days of September, 1979, the Honorable Dean E. Conder presiding.

POINT I

THE TRIAL COURT ERRED IN FINDING THAT MR. AND MRS. BRADFORD FAILED TO USE REASONABLE DILIGENCE IN OBTAINING FINANCING.

This being an action in equity, this Court reviews the complete record, both law and facts, and passes upon the weight and sufficiency of the evidence. Reimain v. Baum, 115 Utah 147, 203 P.2d 387 (1949); Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970).

The evidence set forth in the record is contrary to Findings of Fact numbered 5, as amended, 10 and 11; Conclusions of Law numbered 1, 2, 4, 5, 6, 7, 8, and 9; and the

judgment of the court below; and clearly preponderates against the Respondents.

It is not contested that where an agreement for the sale of real property is expressly made subject to the buyer obtaining financing that the prospective buyer has an implied duty to use "reasonable diligence" in seeking financing. Sorenson v. Connelly, 536 P.2d 328 (Colo. App. 1975); Anaheim Company v. Holcombe, 246 Ore. 541, 426 P.2d 743 (1967).

Inasmuch as all Appellants Bradfords' objections to the lower court's findings, conclusions and judgment, except the objection to Finding No. 5, are based upon the issue of "reasonable diligence," this will first be discussed. Following this, the error in the lower court's Finding No. 5 regarding Mr. and Mrs Bradford's alleged failure to make full disclosure of debts in their loan application will be set forth.

To determine what is "reasonable diligence," all the "facts and circumstances" of the case must be considered. Commercial Security Bank v. Johnson, 110 Utah 342, 173 P.2d 277 (1946); Matlock v. Wheeler, 306 P.2d 325 (Okla. 1957); Aspinwall v. Ryan, 190 Ore. 530, 226 P.2d 814 (1951); Campbell v. Warnberg, 133 Kan. 246, 299 P. 583 (1931).

In Commercial Security Bank, supra, at p. 281, the Court provides that an agreement which fails to set forth a time for performance must, by implication, be performed within a "reasonable" time. In determining what was reasonable, the court set forth the question, "Considering all the facts and

circumstances of this case, was . . . sufficient time for a reasonably prudent and diligent man . . . [to perform the] . . . contract?" (Emphasis added).

This provides us with the determinative test in this case: whether, under the facts and circumstance of this case, Mr. and Mrs. Bradford's efforts to obtain financing were reasonable.

It is uncontradicted that no formal loan application was made by Mr. and Mrs. Bradford until approximately 13 months had elapsed from the date of the execution of the subject Earnest Money contract, Exhibit 1. (Earnest Money dated February 22, 1978; Mr. and Mrs. Bradford applied with Mason-McDuffie sometime in the first part of March, 1979.) (R. 345, 388, Exhibit 1) The Arizona court under similar circumstances, in considering the related issue of abandonment, stated that the mere lapse of time was not sufficient to constitute an abandonment. Glad Tidings Church v. Hinkley, 71 Ariz. 307, 226 P.2d 1016 (1951). Similarly here, the passage of time, though relevant, is not determinative.

More importantly, the facts must be closely analyzed to determine why Mr. and Mrs. Bradford waited to make the formal loan application.

Why? Because Barney Alvey was the construction foreman for Respondents Alveys (R. 376, 450, 451); because Barney Alvey either by telephone or in person had discussions with Mr. and/or Mrs. Bradford approximately every five or six

weeks during this entire time regarding the completion of the home (R. 376-78, 437, 438, 383, 384, 439, 440, 451); because Barney Alvey told Mr. and Mrs. Bradford in February, 1978 that the home would be finished in July or August, 1978 (R. 376, 381, 437); because Barney Alvey told them completion would be delayed because of a problem Alveys were having in obtaining the brick, this happening first in May, then July, and again in September, all in 1978 (R. 384-386, 440); because Mr. and Mrs. Bradford met with Pam Tazzer and Barney Alvey in March, 1978 to choose the tile, tile colors, appliance colors and other items for the home (R. 383, 451); because Pam Tazzer told them in July, 1978 that there was a problem with the brick and it would not be available until September, 1978 (R. 439, 440); because in November, 1978, Mrs. Bradford met with Pam Tazzer in Respondents Alveys' offices and picked out the stone work for the house (R. 440); because in December, 1978, Mr. and Mrs. Bradford were contacted by Respondents Alveys' office and told where to pick out their cabinets (which they did, paying $52.00 above the allowance) (R. 392, Exhibit 8); because in December, 1978, Mr. and Mrs. Bradford paid for purchase and installation for extra countertop material for the house (R. 392, 417; Exhibit 9); because in January, 1979, Barney Alvey told Mr. Bradford that the subject Shiloh home would be finished in approximately two months, and that they should get their existing home sold (R. 441); because in February, 1979, Barney Alvey told Mrs.

Bradford that their home, the subject house, was next on line to be completed (R. 386); because about the first of March, 1979, Mr. and Mrs. Bradford, in reliance on Barney Alvey's statements, sold the home they then owned and were living in (R. 386); because about the first of March, 1979, Mr. Bradford told Barney Alvey that they had sold their home, and Barney Alvey stated he believed their new home could be finished in 30 days (R. 386); because their only contacts with Respondents Alveys were through Barney Alvey and Pam Tazzer, and no one for or on behalf of said Respondents ever inquired or demanded from Mr. or Mrs. Bradford as to the status of the financing nor the payment of any monies (R. 483); and because the first indication of any sort which Bradfords received that the Respondencts were not going to honor the sale agreement came from Respondent Crowley on or about April, 1979 (R. 442).

[In addition to the above, were the statements of Michael Herzog to the Bradfords to the effect that the formal loan application need not be made until the house was near completion (R. 194-198) That testimony of these statements was erroneously excluded by the lower court is more particularly set forth under Point II below.]

Under these facts, was it reasonable for Mr. and Mrs. Bradford to postpone making their formal loan application until March, 1979? Certainly. Respondents Alveys by their actions induced Mr. and Mrs. Bradford into believing throughout

the entire period in question that they (Alveys) were still honoring the subject sale agreement, Exhibit 1. Any reasonable buyer in the place of Mr. and Mrs. Bradford would have acted as they did. They wanted the home very much. Therefore, instead of walking away when the home was not completed as originally anticipated, they continued to work with the sellers, expecting to close the sale at some later date. They saw no need to prematurely seek financing when they were unsure as to when the home would be completed. As soon as they were told the new home was near completion, they not only made a formal loan application, but sold their existing home. They were obviously proceeding reasonably and in good faith.

Why did Respondents repudiate the agreement? In the words of Respondent Crowley, "I just could not economically afford to do it . . .." (R. 507) Unquestionably, prices had increased in the one-year period since the agreement was first executed. Crowley, however, took the subdivision with actual knowledge that Lot 95 had been "presold." (Exhibit 11) He stepped into the shoes of Respondents Alveys. He should have more thoroughly examined his potential liability with respect to the presold lots.

Mr. and Mrs. Bradford's conduct throughout has been reasonable and prudent. They should not be made to suffer for Respondents' error in judgment.

To allow Respondents to back away from this agreement, Exhibit 1, at this point would result in a manifest injustice

to Mr. and Mrs. Bradford. They can be made whole only by this Court exercising its equitable duty and ordering the Respondents to specifically perform pursuant to the original agreement. The judgment of the lower court should be reversed.

Finally, in awarding specific performance, the Court should be aware that:

1. Tender of payment by Mr. and Mrs. Bradford was unnecessary. Although tender of performance is normally required, a party is relieved of this duty where the other party repudiates the underlying agreement. Schmidt v. Sapp, 71 Ariz. 48, 223 P.2d 403 (1950); Flagg v. Fisk, 87 N.Y.S. 530 (1904). Also, it is so elementary as to require no citation that neither law nor equity requires one to do a vain or futile act. Obviously, tender after repudiation would have been and in fact was futile; and

2. Mr. and Mrs. Bradford appear before the Court with "clean hands." Respondents have consistently attempted to paint the Bradfords with unclean hands on the basis that in obtaining their loan commitment in July, 1979, Bradfords did not disclose that they had received $17,000.00 from Mr. Bradford's parents in May of 1979. This is immaterial for two reasons: (a) Although Mr. Feil effectively led Mr. Bradford in deposition into stating that he had to repay the money, this was subsequently clarified in trial. Mr. and Mrs. Bradford testified that they are not under any obligation to repay his parents, but are repaying them on an "if and

when able" basis. (R. 444) His parents do not expect repayment. (R. 424) Mr. Calder of Mason-McDuffie testified that this money would have no effect on the loan if the applicants were not required to repay it. (R. 347, 348); and (b) as previously set forth, no tender was necessary as Respondents had repudiated the agreement. The July 30, 1979 tender was, therefore, superfluous.

Under the circumstances of this case, Mr. and Mrs. Bradford preceeded with reasonable diligence. They should be awarded specific performance and the matter remanded for hearing on costs and attorney's fees.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO ALLOW TESTIMONY BY MR. AND MRS. BRADFORD OF CONVERSATIONS THEY HAD WITH REAL ESTATE AGENT MICHAEL HERZOG.

On direct examination, after testifying that he and Mrs. Bradford had obtained Midvalley's telephone number from a sign in Shiloh subdivision, and that in response to a call, Michael Herzog had come to their house and they had signed the Earnest Money, Exhibit 1, Mr. Bradford was asked:

Q. Were the terms of that earnest money receipt discussed at that time with Mr. Herzog?

A. Yes. It was.

Q. And referring to line 21 of that agreement, will you read that?

A. Says subject to buyer obtaining financing, FHA.

Q. How did that come to be placed in the agreement?

A. Mike Herzog told us that . . .. (R. 372-373)

At that point, Mr. Poulton, counsel for Respondent Crowley, objected on the basis of hearsay. Mr. Feil, counsel for Respondents Alveys, joined in the objection on the same grounds. The lower court at first overruled the objection with respect to Respondents Alveys as the judge apparently had mistakenly heard that Mr. Herzog was the real estate agent for "Alvey Investment" rather than for "Midvalley Investment." (R. 373, lines 8-29) Upon being advised that Herzog was the real estate agent for Midvalley rather than directly for Alveys, the court reversed itself. (R. 374)

The court then expressly denied counsel's contention that Herzog was also the agent for Alveys. (R. 374).

Shortly thereafter, Mr. Bradford testified that Mr. Herzog took him and Mrs. Bradford to American Home Mortgage for a pre-qualification meeting with one of the loan officers. Mr. Bradford was asked:

Q. Did you ever get a loan commitment from American Home Mortgage?

A. No. We did not.

Q. Why not?

A. We were told at the pre-qualification . . ..

At this point, both Mr. Feil and Mr. Poulton objected on the ground of hearsay. The objection was sustained. (R. 375)

It was prejudicial error for the court to sustain these objections.

A. Michael Herzog was the agent for Respondents Alveys for the purposes of this transaction.

Respondents Alveys were the sellers of the subject property. They enlisted Midvalley Investment to market the Shiloh subdivision. The offices of Midvalley and of Respondents Alveys were located in the same building. (R. 382) Respondent Michael Alvey was the vice president and treasurer of Midvalley. Respondent Vaughn Alvey was the president and secretary of Midvalley. (R. 450) Michael Herzog was the real estate agent for Midvalley who came to Mr. and Mrs. Bradford's home to discuss their purchasing a home in the Shiloh subdivision. (R. 372) Respondents Alveys instructed the real estate agents that brought in sale contracts to go and aid the buyers in getting financing. (R. 476)

In fact, Respondent Michael Alvey testified:

> Q. You never called the Bradfords and asked them or told them they had any amount of time to obtain financing did you, yes or no?
>
> A. Not directly.
>
> Q. Did anyone from Alvey Costruction, Yes or no?
>
> A. Mike Herzog was told to. (Emphasis added.)

(R. 493)

The general rule is well established that the realtor is the agent for the seller. Reese v. Harper, 8 Utah 2d 119,

329 P.2d 410 (1958); Giese v. Tarp, 92 Idaho 243, 440 P.2d 521 (1968); Bartsas Realty, Inc. v. Leverton, 82 Nev. 6, 409 P.2d 627 (1966); Alexander Myers & Co., Inc. v. Hopke, 88 Wash. 2d 449, 565 P.2d 80 (1977); Henderson v. Johnson, 66 Wash. 2d 511, 403 P.2d 669 (1965); Zwick v. United Farm Agency, Inc., 556 P.2d 508 (Wyo. 1976).

The seller in this case was the Respondents Alveys. They retained their broker-agency, Midvalley Investment, to market the subject property. Michael Herzog of Midvalley discussed with Mr. and Mrs. Bradford on several occasions the financing and completion of their home on Lot 95. (See the Affidavits of Michael Herzog, R. 194-196, and of Mr. Bradford, R. 197, 198).

It is significant to remember that the only contacts Mr. and Mrs. Bradford had with the Respondents Alveys were through Barney Alvey, Pam Tazzer and Michael Herzog. During the entire period in question, neither of Respondents Alveys had any personal contact with either Mr. or Mrs. Bradford. The original agreement, Exhibit 1, was made and entered into with the realtor, Michael Herzog, on behalf of Respondents Alveys, negotiating it in its entirety. Respondent Michael Alvey testified that Mike Hergoz was told to discuss the financing with the Bradfords. (R. 493) Clearly, Herzog was acting as the agent for Respondents Alveys.

But Michael Herzog is also Respondents Alveys agent by application of the doctrine of "agency by estoppel."

Such an agency may be created in so far as third persons are concerned from acts and appearances which lead third persons to believe the agency has been created. Taylor v. United States Casualty Company, 229 S.C. 230, 925 E.2d 647 (1956).

The relevant facts set forth under the statement of facts are clear and uncontradicted. The offices of Midvalley Investment and of Respondents Alveys were located in the same building. The Respondents Alveys were the president/secretary and vice president/treasurer of Midvalley. None of Respondents Alveys ever personally made any contact with either Mr. or Mrs. Bradford. All negotiations and discussions on the agreement, Exhibit 1, were made through Michael Herzog. Such facts are sufficient to lead a reasonable person to believe that an agency relationship existed. Respondents Alveys should be estopped to deny this.

B. The statements made by Michael Herzog to Mr. and Mrs. Bradford, which were excluded at trial, do not constitute hearsay.

"Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence . . .." Rule 63, Utah Rules of Evidence. (Emphasis added.)

As per the Affidavits of Michael Herzog and Mr. Bradford (R. 194-198), Herzog told Mr. and Mrs. Bradford that it would not be necessary for them to seek financing until the home was

nearly completed. This does not go to the truthfulness of that statement. It is relevant because it was stated and it goes to the reasonableness of Mr. and Mrs. bradford's conduct under the facts and circumstances of this case. It goes to the state of mind of the Bradfords and as circumstantial evidence of such is an exclusion rather than exception from the hearsay rule. See 6 Wigmore, Evidence §1789 (Chadbourn rev. 1976).

C. Even if the excluded testimony was construed to be hearsay, it is admissible under either of two exceptions thereto.

1. Rule 63(8)(a) of the Utah Rules of Evidence provides that an exception to the hearsay rule is "a statement by a person authorized by the party to make a statement or statements for him concerning the subject of the statement." Significant and determinative here is the fact that Respondents Alveys had no personal contact with either Mr. or Mrs. Bradford. The entire negotiations took place between Bradfords and Herzog, Herzog acting as the representative of Respondents Alveys. Herzog was told to discuss financing arrangements with the Bradfords. Clearly, Herzog was the agent of Alveys and was authorized to complete the negotiations on this sale. As such, his statements are authorized admissions and are admissible, particularly those regarding financing.

2. Even if this were not so, Herzog's statements would still be admissible as vicarious admissions under Rule 63(9)(a)

of the Utah Rules of Evidence. This in effect provides that (1) if the judge finds the declarant unavailable as a witness, (2) the statement concerns a matter within the scope of an agency or employment of the declarant for a party, (3) the statement was made before termination of the agency or employment, then (4) his statements will be admissible against the party for whom he was the agent or employee.

Although no evidence was introduced at trial to show the unavailability of Herzog, attempts were made to have him subpoenaed. The process server was unable to locate him.

More importantly, a showing of unavailability was not necessary in this case. The lower court made a definitive ruling that Herzog was not the agent of Respondents Alveys. (R. 374) Thus, an essential element under Rule 63(9)(a), that the declarant be an agent or employee of a party, was found to be missing. It would have been a vain and futile act to show that the declarant was unavailable as the court had already found, though based upon an erroneous holding, that this exception was inapplicable.

The other elements under Rule 63(9()a) are clearly met. Herzog's statements pertained to the obtaining of financing for the closing of the subject agreement. This was clearly within his agency as he alone had negotiated the agreement with the Bradfords on behalf of Alveys and had been expressly told by Michael Alvey to discuss financing with the Bradfords. Also, the statements were made during the period Herzog was employed with Midvalley, agent for Alveys.

D. Proffer of evidence was unnecessary in this instance.

It is conceded that generally the exclusion of evidence in the trial of a case will not be reviewed on appeal unless a proper offer is made at the trial level. Downey State Bank v. Major Blackney Corp., 578 P.2d 1286 (Utah 1978). However, "offers of proof need not be made in all casses, and will not control in all cases when made." In re Young's Estate, 33 Utah 382, 94 P. 731 (1908). An offer of proof is unnecessary where the nature of the error is otherwise clear. Grecor Manolakos, 24 Ariz. 490, 539 P.2d 964 (1975); Gregg v. Gregg, 469 P.2d 406 (Wyo. 1970) Taylor v. McDonald, 409 P.2d 762 (Wyo. 1966).

For Herzog's statements to be admissible under either of the exceptions set forth above, Rule 63(8)(a) or 63(9)(a), the court must find that Herzog was Respondents Alveys' agent. Again, the court expressly found otherwise. That this was error is clear from the record as has been discussed under part A above.

The court in effect held inadmissible any evidence which required a finding of an agency relationship between Herzog and Alveys. In such cases, where an entire class or type of evidence is excluded, an offer of proof is not a prerequisite for arguing the prejudicial nature of the exclusion on appeal. Costa v. Regents of University of California, 116

C.A. 2d 445, 254 P.2d 85 (1953); Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944). An offer under these circumstances would be an idle gesture. Therefore, no proffer was required.

E. The error in excluding this testimony was substantial and prejudicial.

As stated by this Court in Arnovitz v. Tella, 495 P.2d 310 (Utah 1972), an error is substantial and prejudicial if "there would be a reasonable likelihood of a different result in the absence of such error." Clearly, if Mr. and Mrs. Bradford had been allowed to testify that they had been told by Herzog that they need not seek financing until the home was nearly completed, this would be a substantial factor in analyzing the reasonableness of their conduct. In all likelihood, this would have resulted in a different result in the lower court.

This Court should reverse the lower court on the admissibility of Herzog's statements to Bradfords and consequently reverse the holding of that court. Or, in the very least, should remand this matter to the lower court for the taking of additional evidence on the statements made by Mr. Herzog to Mr. and Mrs. Bradford, as set forth in the Affidavits. (R. 194-198)

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR LEAVE TO AMEND PLEADINGS

Subsequent to trial and to the issuance by the court of its decision, counsel for Mr. and Mrs. Bradford filed a Motion for New Trial, To Alter and Amend Judgment and For Leave to Amend Pleadings to Confirm to the Evidence. (R. 173) Along with this was filed an Amended Complaint which set forth in a new Count Five the theory of equitable estoppel. (R. 175, 178).

Rule 15 of the Utah Rules of Civil Procedure provides, in part, "When issues not raised by pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In such cases, the court has no discretion whether or not to allow the proposed amendment but must do so. General Insurance Company v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976)

When is an issue tried by implied consent? Where evidence on that issue is introduced without objection. In General Insurance Company v. Carnicero Dynasty Corp., supra., evidence concerning the circumstances of appellants executing an indemnity agreement was introduced. No objection was made to this. Appellant's counsel moved to amend their answer to plead lack of consideration on the ground that it was necessary to amend the pleadings to conform to the evidence. This

was denied by the trial court on the ground that lack of consideration was an affirmative defense of which the plaintiff-respondent had no notice. On appeal, this Court overruled the lower court by stating, "In the instant action, the evidence upon which Butchers (appellants) based their Motion to Amend was introduced without objection, and thus, the issue of consideration was tried by implied consent."

This Court also held in Wells v. Wells, 2 Utah 2d 241, 272 P.2d 167 (1954) at p. 170, that an amendment will be allowed so long as "a change is not made in the liability subject to be enforced against the defendant."

In the instant case, no additional evidence is required to establish an estoppel. Furthermore, allowing an amendment to set forth estoppel in no way changes the liability sought to be enforced against the Respondents.

Equitable estoppel arises when a party by its actions or representations or otherwise induces another to believe certain facts to exist, and that such other, acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer injustice if the former is permitted to deny the existence of such facts. Kelly v. Richards, 95 Utah 560, 83 P.2d 731 (1938); Morgan v. Board of State Lands, 549 P.2d 695 (Utah 1976)

Respondents Alveys, through Barney Alvey, Pam Tazzer and Michael Herzog, continually represented to the Appellants facts and circumstances regarding the construction of the

home on the subject property. In January of 1979, Barney Alvey expressly told the Appellants to sell their existing home and get their financing ready to go for the Shiloh, subject matter, home. Appellants' contacts and conversations with these persons continued through March of 1979. The only reasonable implication from the conduct of said persons, agents of the Respondents, is that the subject Earnest Money Receipt and Offer to Purchase was still being accepted by them as valid and binding. Respondents should have reasonably known that the Appellants would rely on these contacts and communications in this matter. Appellants did reasonably rely on these representations. At no time were they given notice or any impression but that the Alveys continued to accept the said Earnest Money Receipt as being valid and binding. Respondents should not now be allowed to deny the existence of the validity of this agreement. To do so, would certainly result in injustice to the Appellants.

Again, the liberal amendment policies of the courts should have been exercised to allow amendment of the Complaint to set forth the claim of equitable estoppel.

CONCLUSION

The judgment of the lower court is contrary to the facts of this case as set forth in the record. Further, it was prejudicial error to exclude testimony of conversations between Mr. Bradford and Michael Herzog. The lower

court also erred in denying Appellants Bradfords' Motion to Amend Pleadings to Conform to the Evidence. The judgment should be reversed and Respondents ordered to perform pursuant to the terms of the agreement, Exhibit 1.

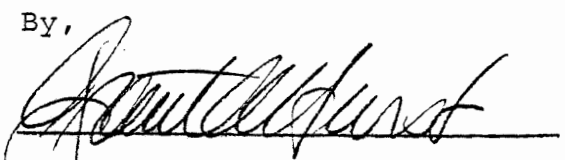
Costs and attorney's fees should then be assessed against the Respondents pursuant to the terms of Exhibit 1. The matter should be remanded to the lower court for a determination of these amounts.

In the alternative, the case should be remanded to allow for the testimony of statements made to Mr. Bradford by Michael Herzog to be presented and considered, and for a finding to be made on the issue of equitable estoppel.

RESPECTFULLY submitted this 28th day of March, 1980.

MARSDEN, ORTON & LILJENQUIST

By,



Grant A. Hurst
Attorney for Plaintiffs-
Appellants

CERTIFICATE OF DELIVERY

I certify that I caused a copy of the foregoing BRIEF to be delivered to Ronald L. Poulton, attorney for Respondent Michael E. Crowley, 9 Exchange Place, Suite 420, Salt Lake City, Utah; and to Randall S. Feil, attorney for Respondents Michael Alvey and Vaughn Alvey, 2000 Beneficial Life Tower, Salt Lake City, Utah, this 28th day of March, 1980.